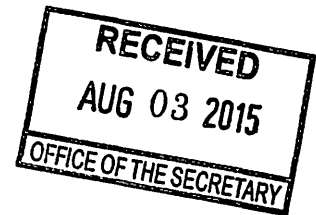




UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
DENVER REGIONAL OFFICE
Byron G. Rogers Federal Building
1961 Stout Street
Suite 1700
Denver, CO 80294-1961

HARD COPY



July 31, 2015

Via E-Mail and Overnight Mail

Honorable Jason S. Patil
Administrative Law Judge
100 F Street, N.E.
Mail Stop 2557
Washington, D.C. 20549

Re: *In the Matter of Delaney*, Admin Proc. No. 3-15873

Dear Judge Patil:

It would be contrary to the Commission's own rules, binding precedent, and common sense to make a determination as to whether the Division's position was substantially justified without considering the evidence – all of the evidence – that informed that judgment. Indeed, it would be fundamentally unfair to exclude such evidence where that evidence has been available to Mr. Delaney since this matter was instituted, particularly because that evidence could not have been admitted during the hearing. The evidence included in the Division's Answer is critical information considered by the Division in making charging decisions, is now part of the administrative record, and should be considered in determining the merits of Mr. Delaney's EAJA claim, particularly since Mr. Delaney has taken the position that the Division was never justified in bringing its case.

Additional Evidence the Division Seeks to Introduce

As an initial matter, the evidence presented at the hearing alone is sufficient to demonstrate that the Division was substantially justified in bringing and maintaining a case against Delaney based on his participation in Penson's violations of Rule 204. The appropriateness of the Division's position, however, is further supported by evidence that was not introduced during the hearing but was available to all parties and did, in fact, inform the Division's charging and litigation decisions. This evidence is further evidence of Delaney's knowledge of Penson's violations and Penson's financial motivation to engage in the violative conduct. More importantly, because these pieces of evidence are consistent with each other, with other evidence introduced at trial, and with a reading of Delaney's *Wells* submission that admits his knowledge, it confirms that the Division's interpretation of other evidence that is part of the hearing record, such as Delaney's admissions, was reasonable.

As to Delaney's knowledge of violations, the Division seeks to supplement the record with Michael Johnson's investigative testimony. (*See, e.g.*, Div. Answer at 19.) The Division offers this testimony as additional evidence that the Division's position that Delaney knew or was reckless in not knowing of Penson's Rule 204 violations was reasonable and that the Division's interpretation of Delaney's admissions of awareness of those violations in his *Wells* submission was also reasonable. Although the Division was ultimately unable to elicit this precise testimony at the hearing, the investigative testimony demonstrates that the Division had substantial justification for believing it could establish a factual basis

for Delaney's awareness when it brought the case.¹ The Division also seeks to supplement the record with Rudy DeLaSierra's investigative testimony, and Brian Gover's investigative testimony and declaration. (See, e.g., Div. Answer at 18-20.) These statements are offered to show that the testimony of these witnesses was consistent throughout and demonstrate the Division substantial justification for believing it could establish Delaney's awareness of the violations, as well as that the Division's interpretation of Delaney's admissions of awareness in his *Wells* submission was reasonable.

As to financial motive, the Division seeks to supplement the record with Lindsey Wetzig's investigative testimony. (See, e.g., Div. Answer at 33.) This testimony is offered to show that his hearing testimony was consistent with his pre-hearing testimony, and to show that the Division's interpretation of Delaney's admissions concerning Person's "huge financial incentive" was reasonable and that the Division had substantial justification for believing it could establish an allegation of financial motive when it brought the case. The Division also seeks to supplement the record with Michael Johnson's investigative testimony, Brian Gover's declaration, and Brian Hall's investigative testimony. (See, e.g., Div. Answer at 32-33.) These statements are offered to show that the Division's interpretation of Delaney's admissions concerning "huge financial incentive" was reasonable and that the Division had substantial justification for believing it could establish an allegation of financial motive when it brought the case.

Whether Such Evidence Could Have Been Introduced During the Hearing

The majority of this evidence could not have been admitted into evidence during the hearing. Commission Rule of Practice 235 limits the admissibility of prior sworn statements at an administrative hearing and it is the practice not to admit such evidence when the witness is testifying at the hearing. Brian Gover's declaration, the investigative testimony of Rudy DeLaSierra, Brian Gover, Lindsey Wetzig, and Brian Hall, and the majority of Michael Johnson's investigative testimony could not have been introduced as those prior statements were not plainly inconsistent with the hearing testimony.²

Whether the Relevant Investigative Testimony was Admitted at the *Flanagan* Hearing

No investigative testimony was admitted at the underlying *Flanagan* hearing. (Exhibit A.) Nor was any investigative testimony used to impeach Mr. Holloway. (Exhibit B.) In fact, it appears that in *Flanagan*, unlike in this case, there was no investigative testimony supporting the Division's position, but that the Division relied on interviews in making its allegations. At the *Flanagan* hearing, the Division conceded that it had been unable to provide evidence of Holloway's control, saying, during argument on a Motion for Summary Disposition:

[T]he division in its previous – this is not in evidence, your Honor – in its previous conversations with Mr. Holloway had been informed that he as the patriarch of the family

¹ The testimony elicited at trial from Johnson was close to the investigative testimony and established that Delaney knew or should have known of the violations. (See Div. Answer at 19.) The Division was substantially justified in concluding that the trial testimony, together with DeLaSierra's, Gover's, and Delaney's trial testimony, established, at least, recklessness.

² The Division possibly could have impeached Michael Johnson's hearing statement that he did not know what Delaney knew with his investigative testimony.

was the one who handled all the investments. His testimony in the record, your Honor, did not support that, so the evidence is not there, your Honor.

Flanagan hearing transcript at p. 550, l 8-14 (Exhibit C) (emphasis added).

Despite the fact that no investigative testimony or other evidence of Holloway's control had been offered at the hearing, the Commission found, on the basis of statements made to the Division prior to the hearing, that the Division had substantial justification for believing it could establish a factual basis for this allegation when it brought the case, even though it was ultimately unable to adduce the evidence the hearing. *Michael Flanagan*, 2004 WL 1538526 at *7 (July 7, 2004).

Such a conclusion is hardly surprising as the Commission's Rules of Practice specifically provide that the Division's answer in an EAJA proceeding may include "facts not already in the record of the proceeding." See 17 C.F.R. § 201.52(c) ("If the answer is based on an alleged facts not already in the record of the proceeding, it shall include supporting affidavits or a request for further proceeding under § 201.55.") The investigative testimony and declaration included with the Division's Answer are precisely what the Commission's rules contemplate and are equivalent to an affidavit. See, e.g., *SEC v. American Commodity Exch.*, 546 F.2d 1361, 1369 (10th Cir. 1976); *SEC v. Research Automation Corp.*, 585 F.2d 31, 34 n. 5 (2nd Cir. 1978); *SEC v. Phan*, 500 F.3d 895, 913 (9th Cir. 2007). As exhibits to the Division's Answer, they are now part of the hearing record. See 17 C.F.R. § 350(a)(2). The Division has properly included those sworn statements to support facts not already in the record.

Basis for Consideration of Investigative Testimony and Declaration

Fairness and common sense also require that Your Honor consider this evidence. First, it makes sense that the Court consider all of the evidence on the question before it: whether "the position taken by the Division in the adversary adjudication [and] the action ... upon which the adversary adjudication is based" was "substantially justified." 17. C.F.R. § 201.35(a). This evidence, by definition, includes the evidence available to the Division prior to the hearing, including investigative testimony. Investigative testimony is critical evidence in almost every enforcement matter, serves as a basis for seeking Commission authorization to bring that matter, and is produced to respondents as a matter of course. See 17 C.F.R. § 201.230. In addition, as Your Honor already noted during oral argument on Mr. Delaney's EAJA application, any contrary holding would only result in the Division being forced to attempt to build a voluminous and burdensome hearing record to protect against unlikely, but possible, EAJA motions. Moreover, as noted above, those efforts would still likely not result in the necessary evidence being in the record.

Flanagan makes clear that the Court should look beyond the evidence offered at the hearing to understand the justification for the Division's position when it brought the case, rather than after the Court has made evidentiary and credibility findings. *Flanagan* and 17 C.F.R. §201.52(c) both provide the basis for considering the additional evidence included in the Division's Answer as part of the hearing record and as additional evidence of the Division's substantial justification.³

³ I may have misspoken when I stated that there was no conflict between the allowable rates. 17 C.F.R. §36(b) allows a rate of \$75, while 5 USC §504(b)(1)(a) allows a fee of \$125. There is no conflict, however, between the Commission's rule and the cost of living escalator in 28 USC § 2412(2)(A) cited by Delaney. The Commission does not have, nor is it required to have, such an escalator. See 5 USC §504(b)(1)(a); 17 C.F.R. §36(b).

Sincerely,

A handwritten signature in blue ink, appearing to read 'Polly Atkinson', with a long horizontal flourish extending to the right.

Polly Atkinson

Trial Counsel

Division of Enforcement

UNITED STATES OF AMERICA
BEFORE THE
UNITED STATES SECURITIES AND EXCHANGE COMMISSION

In the Matter of:

U.S. SECURITIES & EXCHANGE
COMMISSION,

Plaintiff

v

MICHAEL FLANAGAN,
RONALD KINDSCHI, and
SPECTRUM ADMINISTRATION, INC.

Respondents

:
:
:
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:
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:

File No. 3-9784

Richard B. Russell Federal
Building
75 Spring Street
Atlanta, Georgia

Wednesday, May 28, 1999

Thursday April 27

The above entitled matter came on for hearing at
8:55 a.m. pursuant to notice.

BEFORE:

JAMES T. KELLY, Administrative Law Judge

DIVERSIFIED REPORTING SERVICES, INC.
(202) 296-2929

COPY



APPEARANCES:

On behalf of the Securities and Exchange
Commission:

WILLIAM S. DIXON, Attorney
WILLIAM A. REES, Attorney
U.S. Securities & Exchange Commission
3475 Lenox Road, N.E.
Atlanta, Georgia 30326-1232

On behalf of the Respondents:

MICHAEL K. WOLENSKY, Attorney
DAVID J. GELLEN, Attorney
Kutak Rock
225 Peachtree Street, N.E.
Suite 2100
Atlanta, Georgia 30303-1731

Also present: ADAM RABIN, Spectrum Administration, Inc.
JAMES WARDRICK, Law Clerk

I N D E X

Witness:	Direct	Cross	Redirect	Recross
David J. Konell	35	--	--	--
Ronald O. Kindschi	49	102	112	--
Philip Wiedrick	117	136	147	--
Wayne Venckus	150	154	159	--
Michael A. Flanagan	161	--	--	--
John L. Holloway	221	240	--	--

E X H I B I T S

Division	Description	Marked	Rec'd
1-17	Fax cover sheet from B. Grubin to D. Konell and 6/21/93 letter	37	40
2-20	Screen print of SmartPad/Notes	40	49
3-12	Steps 3 & 4 of 5 step plan for Long Beach Plywood Retirement	64	67
4-1	6/22/93 confirmation of trade for Long Beach Plywood	71	75
5-8	Summary of Putnam Accounts-1993	86	90
6-19	Account application form Philip Wiedrick trustee	94	96
7-14	5/20/94 letter to Putnam Investor Service from R. Kindschi	100	102
8-15	7/1/94 Fee liquidation request signed by P. Wiedrick	127	129
9-16	7/21/94 to FFR from P. Wiedrick on Long Beach Plywood letterhead	129	130
10-97	7/7/93 letter P. Wiedrick from Ralph Doudera	133	135
11-26	1/1/93 - 12/31/93 Putnam Investment Statement for Holloways	168	169
12-43	Prospect to Putnam Muni Income Fund	170	177
13-32	MFS Group Investment statement for John Holloway, III - IRA	178	179
14-42	Withdrawn	180	W/D
15-34	MFS 1/3/94 - 12/31/94 investment statement-Esther Holloway - IRA	187	188

EXHIBITS (Continued):

Division:		Marked	Rec'd
16-27	Kemper Mutual Fund Statement 1/1/94 -12/31/94 John L. Holloway, III - IRA	188	190
17-52	Kemper Mutual Fund Statement 12/31/93 Nell E. Holloway	190	192
18-67	Kemper Mutual Fund Statement 12/31/93 Alex Williams	192	194
19-71	Putnam Mutual Fund Statement 1/1/93 - 12/31/93, Esther Holloway for A. Williams	195	196
20-28	Kemper Mutual Fund Statement 1/1/94 - 12/31/94, Esther Holloway - IRA	202	204
21-55	Letter to Kemper concerning re-registration of Nell Holloway account	211	214
22-58	MFS investment history statement, J.L. Holloway, III for Nell E. Holloway estate	214	232
23-39	Asset Management Agreement - John L. Holloway	223	224
Respondent			
1-1	Newsletter <u>The Full Spectrum</u> , 1/93	144	--
2-18	Asset Management Agreement - John L. Holloway	249	--
3-21	4/18/95 acknowledgement signed by John L. Holloway, Jr.	249	--
4-16	Spectrum Admn. - Confirmation of Contract Termination dated 6/2/95	254	--

In the Matter of:

Plaintiff

v

Respondents

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File No. 3-9784
:
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:
:

Richard B. Russell Federal
Building
75 Spring Street
Atlanta, Georgia
Wednesday, May 28, 1999

BEFORE:

DIVERSIFIED REPORTING SERVICES, INC.
(202) 296-2929

COPY

APPEARANCES:

On behalf of the Securities and Exchange
Commission:

WILLIAM S. DIXON, Attorney
WILLIAM A. REES, Attorney
U.S. Securities & Exchange Commission
3475 Lenox Road, N.E.
Atlanta, Georgia 30326-1232

On behalf of the Respondents:

MICHAEL K. WOLENSKY, Attorney
DAVID J. GELLEN, Attorney
Kutak Rock
225 Peachtree Street, N.E.
Suite 2100
Atlanta, Georgia 30303-1731

Also present: ADAM RABIN, Spectrum Administration, Inc.
JAMES WARDRICK, Law Clerk

I N D E X

Witness:	Direct	Cross	Redirect	Recross
Mitchell Fishman	278	294	303	304
Mary E. Calhoun	308	384	--	--

E X H I B I T S

<u>Division</u>	<u>Description</u>	<u>Marked</u>	<u>Rec'd</u>
24-6	6/29/93 Account Transcript for Philip Wiedrick	281	282
25-83	Calhoun Report & Opinion	326	327
26-13	FSC 10/24/96 Report	332	452
27-41	4/1/94 MFS Cash Reserve Fund Prospectus with statement of additional information	372	375

<u>Respondent</u>	<u>Description</u>	<u>Marked</u>	<u>Rec'd</u>
5-57	11/22/93 letter to R. Kindschi from Alex Nelson	298	--
6	4/18/94 letter from Alex Nelson	299	--
7	1/1/93 Putnam High Yield Trust Prospectus	387	--
8	"New SEC Rulings"	392	--
9	Rule 2210 - Communications with the Public	397	--
10	Notices to Members	432	--

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

In the Matter of: :
: :
U.S. SECURITIES AND EXCHANGE :
COMMISSION, :
: VOLUME III OF IV
Plaintiff, :
: File No. 3-9784
v. :
: :
MICHAEL FLANAGAN, :
RONALD KINDSCHI, and :
SPECTRUM ADMINISTRATION, INC., :
: :
Respondents. :
: :

U.S. Tax Courtroom 1136
Richard B. Russell Federal
Building
75 Spring Street
Atlanta, Georgia

Thursday, April 29, 1999

The above-entitled matter came on for further
hearing, pursuant to Adjournment, at 9:35 a.m.

BEFORE:

HON. JAMES T. KELLY, Administrative Law Judge

Diversified Reporting Services, Inc.
202.296.2929

COPY

APPEARANCES:

On behalf of the Securities and Exchange Commission:

WILLIAM A. REES, Staff Attorney
WILLIAM S. DIXON, Staff Attorney
Securities and Exchange Commission
3475 Lenox Road, Suite 1000
Atlanta, Georgia 30326-1232

On behalf of Respondents:

MICHAEL K. WOLENSKY, Attorney-at-Law
DAVID J. GELLEN, Attorney-at-Law
Kutak Rock
225 Peachtree Street, NE
Suite 2100
Atlanta, Georgia 30303-1731

Also present:

ADAM RABIN, Spectrum Administration, Inc.
JAMES WARDRICK, Law Clerk

I N D E X

<u>WITNESSES:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Ralph Doudera	460	471	518	524
	--	--	525	526
	--	--	527	--
Michael Flanagan	559	623	625	--
Paul D. Kanter	630	--	--	--
Ronald Kindschi	660	--	--	--
<u>EXHIBITS:</u>			<u>IDENTIFIED</u>	<u>RECEIVED</u>

Respondent's:

1-1 thru 10	--	558
11 - Top Money Managers 4/1/91	474	558
12-25 - SFI Asset Management Agreement Philip Wiedrick 12/28/90	483	558
13 - The Full Spectrum issues	487	558
14 - Article Wall Street Journal 5/5/99	511	558
15 - Letter to Mary Fulford 5/28/93	512	558
16-11 - Letter 11/21/95 MFS to Holloway	557	586
17-13 - Account Application Nell Holloway	557	591
18-14 - Account Application Nell Holloway	557	592
19-15 - MFS Statement 1/3/95 to 8/7/95	557	594
20-22 - FFR Asset Management Agreement Nell Holloway 10/26/93	557	596
21-32 - "Investment Objective"	557	601
22-33 - FFR Asset Management Agreement J. & E. Holloway 10/26/93	557	604
23-34 - FFR Asset Management Agreement J. & E. Holloway 10/26/93	557	604

INDEX (Continued):EXHIBITS:IDENTIFIED RECEIVED

Respondent's:

24-35 - FFR Asset Management Agreement J. & E. Holloway 10/26/93	557	605
25-36 - FFR Asset Management Agreement J. & E. Holloway 10/26/93	557	605
26-37 - FFR Asset Management Agreement J. & E. Holloway 11/17/93	557	606
27-38 - Investment Policy Statement for John Holloway & Esther Holloway	557	609
28-39 - IRA Application, Esther Holloway 7/8/94	557	611
29-42 - Acknowledgement E. Holloway 7/8/94	557	612
30-43 - Acknowledgement E. Holloway 10/25/93	557	612
31-44 - SAI Asset Management Agreement E. Holloway 7/8/94	557	613
32-45 -SAI Asset Management Agreement E. Holloway 7/8/94	557	613
33-48 - Acknowledgement E. Holloway 10/25/93	557	614
34-49 - Acknowledgement J. Holloway 7/8/94	557	614
35-51 - Investment Policy Statement Alex Williams Trust 3/31/96	557	616
36-52 - The Investment Data Questionnaire Process E. Holloway, Trust of Alex Williams	557	617
37-53 - Account Application E. Holloway 3/20/85	557	617
38-54 - Acknowledgement E. Holloway 10/7/93	557	619
39-55 - FFR Asset Management Agreement E. Holloway 10/7/93	557	619

INDEX (Continued)

<u>EXHIBITS:</u>	<u>IDENTIFIED</u>	<u>RECEIVED</u>
40-56 - FFR Asset Management Agreement E. Holloway 11/5/93	557	620
41-57 - Exhibit Stricken	557	--
42-64 - John Holloway Total Portfolio Executive Summary	557	622
43-65 - Alex Williams Trust, Esther Holloway TTEE, Composite Report Executive Summary	557	622
44-66 - Esther Holloway Composite Report Executive Summary	557	623
45-60 - Kanter Handwritten Notes	557	640
46-59 - Kanter Handwritten Notes	557	645
47-67 - Composite Exhibit - Reports	557	659
48-3 - Investment Management Process	666	666
49-26 - FFR Asset Management Agreement Long Beach Plywood 6/6/93	667	669
50-27 - FFR Asset Management Report Long Beach Plywood 6/6/93	669	669
51-61 - Composite Exhibit	683	684
52-62C - FFR Advisory, LLC Performance Evaluation for Long Beach Plywood period ending 12/31/98	684	686

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

In the Matter of: :
 :
U.S. SECURITIES AND EXCHANGE :
COMMISSION, :
 :
Plaintiff, : VOLUME IV OF IV
 : File No. 3-9784
v. :
 :
MICHAEL FLANAGAN, :
RONALD KINDSCHI, and :
SPECTRUM ADMINISTRATION, INC., :
 :
Respondents. :
 :

U.S. Tax Courtroom 1136
Richard B. Russell Federal
Building
75 Spring Street
Atlanta, Georgia

Friday, April 30, 1999

The above-entitled matter came on for further
hearing, pursuant to Adjournment, at 9:30 a.m.

BEFORE:

HON. JAMES T. KELLY, Administrative Law Judge

Diversified Reporting Services, Inc.
202.296.2929

COPY

APPEARANCES:

On behalf of the Securities and Exchange Commission:

WILLIAM A. REES, Staff Attorney
WILLIAM S. DIXON, Staff Attorney
Securities and Exchange Commission
3475 Lenox Road, Suite 1000
Atlanta, Georgia 30326-1232
Assisted by Jim Curtis

On behalf of Respondents:

MICHAEL K. WOLENSKY, Attorney-at-Law
DAVID J. GELLEN, Attorney-at-Law
Kutak Rock
225 Peachtree Street, NE
Suite 2100
Atlanta, Georgia 30303-1731

Also present:

ADAM RABIN, Spectrum Administration, Inc.
JAMES WARDRICK, Law Clerk

1 Q But I'm talking about back in 1993 and 1994, you
2 had a power of attorney, correct?

3 A (No audible response)

4 Q Mr. Holloway? Did you hear my question?

5 A I answered it yes.

6 Q I'm sorry, I didn't hear that. Did you have a
7 power of attorney or any authority over the Alex Williams
8 account?

9 A No.

10 Q Who did?

11 A My wife, Esther Holloway.

12 Q Did you have any authority or power of attorney
13 over your wife's IRA account?

14 A No.

15 Q Did she talk with Mr. Flanagan with respect to
16 those accounts?

17 A Yes.

18 Q Were you always present in the meetings when those
19 conversations occurred?

20 A No.

21 Q You more or less left her business up to her, is
22 that fair to say?

23 A Yes. I mean, sometimes we would be having joint
24 meetings, and it was assumed what he was saying to me also
25 effected her in the same way. So the two of us could have



1 JUDGE KELLY: -- and her father, Alex Williams.

2 MR. DIXON: That's correct, your Honor.

3 JUDGE KELLY: The Esther Holloway IRA and Alex
4 Williams. Those are the customers, are they not?

5 MR. DIXON: That's correct, your Honor.

6 JUDGE KELLY: Okay. Where is the customer
7 testimony as to that?

8 MR. DIXON: Your Honor, the division in its
9 previous -- this is not in evidence, your Honor -- in its
10 previous conversations with Mr. Holloway had been informed
11 that he as the patriarch of the family was the one who
12 handled all the investments. His testimony in the record,
13 your Honor, did not support that, so the evidence is not
14 there, your Honor.

15 JUDGE KELLY: Where does that leave us as to that
16 narrow issue?

17 MR. DIXON: As to that narrow issue, your Honor,
18 the division concedes that with respect to any allegations
19 with respect to Mr. Flanagan's representations regarding that
20 to Ms. Holloway.

21 The division still believes that Mr. Flanagan by
22 not explaining all the rules regarding these transactions to
23 Mr. Holloway, and depriving he and his wife of the
24 opportunity to combine those accounts committed fraud with
25 respect to Mr. Holloway.

